

## Background Brief Title IX Trans Rights

During President Obama's tenure, the Department of Education (ED) issued a May 2016 Dear Colleague Letter<sup>1</sup> (DCL) instructing institutions clearly and for the first time that under Title IX of the Education Amendments of 1972 (Title IX)<sup>2</sup>, "a school must not treat a transgender student differently from the way it treats other students of the same gender identity" and doing so without "requiring students to produce ... identification documents in order to treat them consistent with their gender identity." The DCL's open acknowledgement of the rights of trans students<sup>3</sup> was just one of many local<sup>4</sup>, state<sup>5</sup>, and federal<sup>6</sup> actions to protect trans individuals. At the same time, a wave of backlash was also sweeping the country as lawmakers introduced policies and legislation that quickly became known as "bathroom bills"<sup>7</sup> designed to restrict access to bathroom and locker room facilities based on the gender an individual was assigned at birth. As is expected when legal guidance is changing, multiple court cases challenging discriminatory bathroom policies were filed (e.g., *GG v. Gloucester County School Board*<sup>8</sup>; *Whitaker v. Kenosha Unified School District*<sup>9</sup>; *Evancho, et al. v Pine-Richland School District*<sup>10</sup>). The Supreme Court (SCOTUS) agreed to hear arguments in *GG v. Gloucester County School Board* in March 2017, a move many hoped would bring final clarity, but actions by the Trump administration prevented SCOTUS from ruling in the case.

The tenuous nature of trans students' rights has been in the spotlight for the last several years, with media attention focusing both on the discrimination faced by LGBTQIA students in

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<sup>1</sup> ED OCR Dear Colleague Letter re Trans Student Rights (May 13, 2016):

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

<sup>2</sup> Title IX of the Educational Amendments of 1972: <https://www.justice.gov/crt/title-ix-education-amendments-1972>

<sup>3</sup> Title IX is also the primary vehicle governing campus responsibilities related to sexual assault prevention and response; a separate background brief is available covering changes in responsibilities around campus sexual assault adjudication for those interested in recent developments.

<sup>4</sup> Charlotte City Council approves LGBT protections in 7-4 vote:

<http://www.charlotteobserver.com/news/politics-government/article61786967.html>

<sup>5</sup> Transgender Law Center Equality Maps: <https://transgenderlawcenter.org/equalitymap>

<sup>6</sup> President Obama Signs a New Executive Order to Protect LGBT Workers:

<https://obamawhitehouse.archives.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>

<sup>7</sup> See RPI blog posts State Legislative Analysis: Bathroom Bills (March 2, 2017):

<https://www.naspa.org/rpi/posts/state-legislative-analysis-bathroom-bills>; and The Status of Trans Rights in 2018 (March 1, 2018): <https://www.naspa.org/rpi/posts/the-status-of-trans-rights-in-2018>

<sup>8</sup> *GG v. Gloucester County School Board*: <https://www.aclu.org/cases/gg-v-gloucester-county-school-board>

<sup>9</sup> *Whitaker v. Kenosha Unified School District*: <https://transgenderlawcenter.org/legal/youth/whitaker>

<sup>10</sup> *Evancho, et al. v Pine-Richland School District*: <https://www.lambdalegal.org/in-court/cases/evancho-v-pine-richland-school-district>

education and the ways that those students are fighting back. *The Washington Post* recently highlighted<sup>11</sup> the ways that trans high school students are continuing to challenge their schools' discriminatory policies by tackling their existing locker room policies. The article is a good overview of both the individual challenges faced by one trans student and his family in Maryland, as well as a reminder about the students who came before him and brought discrimination cases against their schools. The article should serve as notice to student affairs practitioners that in spite of the rollback of protections<sup>12</sup> by the Department of Education (ED) in 2017, trans students continue to arrive at institutions of higher education with expectations of equal treatment and provision of accessible facilities.

Indeed, according to *Discrimination in America: Experiences and Views of LGBTQ Americans*<sup>13</sup>, a recent study conducted by NPR, the Robert Wood Johnson Foundation, and the Harvard School of Public Health, 58% of LGBTQ<sup>14</sup> survey participants indicated that LGB individuals are discriminated against in college, and 64% indicated that trans students in particular are discriminated against in college. This isn't to say that campuses haven't taken important steps to support trans and LGB students. Many institutions have established LGBTQ Resource Centers and implemented trans friendly policies. But the data in the NPR/RWJ/HSPH report is an important indicator for student affairs administrators that many LGBTQ individuals still experience, and witness their peers experiencing, discrimination at our institutions.

It is against this troubling policy backdrop that NASPA conducted an introductory study in spring 2017 of campus efforts to address trans students' rights. The preliminary data from this study was discussed at the NASPA annual conference in 2017 and will be highlighted in the forthcoming text, *Dialogues About Equity, Civility, and Safety: Contested Issues in Student Affairs*<sup>15</sup>. The respondents indicated that many campuses put trans students' rights working groups in place after the Obama administration guidance was issued. At the time of the survey, many of those working groups were still engaged in efforts to improve campus climate for their

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<sup>11</sup> Battle over transgender student rights moves to high school locker rooms:

[https://www.washingtonpost.com/local/public-safety/battle-over-transgender-student-rights-moves-to-high-school-locker-rooms/2018/04/25/b319365a-3f29-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/local/public-safety/battle-over-transgender-student-rights-moves-to-high-school-locker-rooms/2018/04/25/b319365a-3f29-11e8-974f-aacd97698cef_story.html)

<sup>12</sup> ED OCR Dear Colleague Letter re Trans Student Rights (February 22, 2017):

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>

<sup>13</sup> *Discrimination in America: Experiences and Views of LGBTQ Americans*:

<https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2017/11/NPR-RWJF-HSPH-Discrimination-LGBTQ-Final-Report.pdf>

<sup>14</sup> Typically, NASPA would use the acronym LGBTQIA, however the study conducted by NPR, the Robert Wood Johnson Foundation, and the Harvard School of Public Health uses LGBTQ to refer to the same population. In order to avoid possible misstatement of the study results, we will use the acronym LGBTQ when referring to the findings of the study.

<sup>15</sup> Magolda, P. M., Magolda, M. B. B., & Carducci, R. (Eds.). (Forthcoming). *Contested Issues in Troubled Times: Student Affairs Dialogues about Equity, Civility, and Safety*. Stylus Publishing, LLC.



trans students, despite the rollback of guidance by ED. It is promising, and likely reassuring for trans students that campuses are still pushing toward equitable and accessible policies and facilities on their campuses in spite of the change in focus by the current administration.

This brief provides an overview of erosions of trans student rights and protections at the federal level, attempts to further restrict rights at the state level, and actions taken to push back against discriminatory policies in the state and federal courts.

## **NASPA Position on Trans Student Rights & Protections**

Student affairs professionals see first-hand the day-to-day lived experiences of our colleagues and students. Sharing their stories is a powerful policy advocacy tool, both in state legislatures and in campus leadership meetings. We encourage our members to continue to support our Association and professional values of integrity, innovation, inclusion, and inquiry and work to protect and defend the rights of trans individuals in our communities. NASPA is committed to helping its members continue to push forward on providing adequate support services and trans friendly policies and procedures at their institutions. The Research and Policy Institute currently tracks both protective and discriminatory state-level legislation aimed at trans students in its weekly policy updates<sup>16</sup>. Additionally, the NASPA Acts Rally for Students' Rights at the 2018 NASPA Annual Conference in Philadelphia focused on supporting trans students' rights during these challenging times.

***Reinstate Obama-era protections for trans students under Title IX.*** The NASPA Board of Directors resolved during their March 2017 meeting, on behalf of its members, support for the reinstatement of the Obama-era guidance regarding the protection of trans students in our nation's schools, colleges, and universities. NASPA therefore supports the expansion of Title IX sex discrimination protections to include gender identity.

***Oppose state or federal legislation that restricts the rights of trans individuals to be treated in any way inconsistent with their gender identity.*** Policies and laws that restrict the rights of trans individuals to access public bathroom or changing facilities or to require identification documentation to treat trans individuals consistent with their gender identity is discriminatory. In the 2018 state legislative session alone 18 exclusionary and anti-trans pieces of legislation were introduced. Such legislation has the potential to increase harassment in and around public and school bathrooms and increase danger for trans individuals and others suspected of violating these laws, resulting in the laws decreasing safety instead of their oft-stated intent to increase safety.

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<sup>16</sup> Weekly policy updates are generally posted on Monday afternoons on the RPI blog: <https://www.naspa.org/rpi>



***Oppose discrimination under the guise of religious freedom.*** Legislation purporting to protect religious freedom creates a false rift between religious freedom and the rights of LGBTQ individuals. During the 2018 state legislative session, Oklahoma introduced a measure (OK SB 1250)<sup>17</sup> restricting bathroom access for trans individuals under the guise of religious freedom, and while it did not move forward, represents continued efforts to restrict trans individuals' rights as a form of religious freedom. NASPA recognizes that religious freedom does not necessitate discrimination against groups of individuals and is, in fact, antithetical to the beliefs and values of many religions. Legitimizing discrimination under the name of religious freedom undermines NASPA's values of integrity, innovation, inclusion, and inquiry.

***Creation of federal legislation firmly establishing trans individuals' rights.*** NASPA applauds federal court rulings that find protection for trans student rights to be included under the 14<sup>th</sup> Amendment as well as state actions to protect trans individuals. Our association leaders recognize, however, the patchwork nature of rights this approach creates across our country. We urge Congress to take action in crafting federal legislation to firmly secure and protect the rights of trans individuals.

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<sup>17</sup> <https://legiscan.com/OK/text/SB1250/2018>



## Federal Erosions of Trans Rights & Protections

Concerns regarding how the Trump Administration would address civil rights cases were raised during Secretary of Education Betsy DeVos's confirmation hearings<sup>18</sup>, the appointment of Candice Jackson<sup>19</sup> to Acting Assistant Secretary of Education for Civil Rights, the initial attempts to bar trans individuals from serving in the armed forces<sup>20</sup>, and the October 2017 reversal<sup>21</sup> of the Department of Justice (DOJ) guidance extending Title VII employment anti-discrimination protection to include sexual orientation and gender identity.

In February 2017, Secretary DeVos rescinded<sup>12</sup> the Obama administration's guidance protecting trans students. Additionally, in February 2018, ED's Office of Civil Rights (OCR) further walked back protections for trans students by indicating it would refuse to investigate student complaints about discriminatory bathroom policies<sup>22</sup>. Department Spokeswoman Liz Hill confirmed to several media sources that while the harassment or penalization of students for "failing to conform to sex-based stereotypes" remains sex discrimination prohibited by Title IX, the requirements of students to use bathroom or changing facilities corresponding to their sex assigned at birth is not. This series of decisions comes on the heels of a decidedly anti-trans shift in national climate supported in part by President Trump's suggestion that trans members of the military<sup>23</sup> be forced to serve according to the gender they were assigned at birth. Despite a mid-April court decision<sup>24</sup> barring President Trump's trans military ban from being implemented, the repeated attempts to deny trans individuals their civil rights adds considerably to the mental health burden carried by trans students.

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<sup>18</sup> Booker: 'No confidence' on DeVos's support for civil rights office: <http://thehill.com/blogs/floor-action/senate/318202-booker-no-confidence-on-devoss-support-for-civil-rights-office>

<sup>19</sup> DeVos Pick to Head Civil Rights Office Once Said She Faced Discrimination for Being White: <https://www.propublica.org/article/devos-candice-jackson-civil-rights-office-education-department>

<sup>20</sup> Trump signs directive banning transgender military recruits: <http://www.cnn.com/2017/08/25/politics/trump-transgender-military/index.html>

<sup>21</sup> Sessions says civil rights law doesn't protect transgender workers: <http://www.cnn.com/2017/10/05/politics/jeff-sessions-transgender-title-vii/index.html>

<sup>22</sup> Education Department no longer investigating transgender bathroom complaints: <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/>

<sup>23</sup> Trump Approves New Limits on Transgender Troops in the Military: <https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html>

<sup>24</sup> Trump's Military Trans Ban Same as Before, Judge Says: <https://www.bloomberg.com/news/articles/2018-04-14/trump-s-updated-military-trans-ban-is-same-as-before-judge-says>



In response to the changes in guidance from OCR, legal and community advocacy groups<sup>25</sup> along with institutions of higher learning<sup>26</sup> across the country released statements condemning the decision and hundreds of people took to the streets<sup>27</sup> in protest. Despite these protests, the February rescission, which offered no supplemental guidance in its place, resulted in a political domino effect. Citing the change in guidance, the Supreme Court decision remanded *G.G. vs Gloucester County School Board*<sup>8</sup>, which could have set a national precedent to protect trans students' rights to bathroom and changing facility access, back to the lower court for decision.

At the same time, the Office for Civil Rights (OCR) halted several Title IX investigations regarding trans students. Reports began emerging in summer 2017 that OCR was closing trans student discrimination complaint cases<sup>28</sup>, leading to additional apprehension for trans students. OCR dismissed a case in Ohio from 2016<sup>29</sup> where an elementary school student was wrongly restricted from using the girls' bathroom and was subsequently harassed. The case was withdrawn as the claims of discrimination were based on the now-rescinded May 2016 Dear Colleague Letter<sup>1</sup> extending Title IX sex discrimination protections to trans individuals. Similarly, the *Washington Post* reported that an investigation regarding a locker room use case in Palatine, IL<sup>30</sup>, was dropped as well.

Rollbacks to trans rights continued in June 2017<sup>31</sup> when an internal OCR staff memo instructed investigators to follow Title IX protocol, which, in accordance with the February rescission no longer extended to trans students' rights to occupy the restroom or changing facility of appropriate for their gender identity. Then-acting assistant secretary for civil rights Candace

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<sup>25</sup> Civil and Human Rights Community Condemns Rescission of Title IX Guidance Clarifying Protections for Transgender Students: <https://civilrights.org/civil-and-human-rights-community-condemns-rescission-of-title-ix-guidance-clarifying-protections-for-transgender-students/>

<sup>26</sup> Reaffirming support for our transgender community: <http://inside.wfu.edu/2017/02/message-reaffirming-support-for-our-transgender-community/>

<sup>27</sup> Chicago rally for transgender rights: <http://www.chicagotribune.com/news/local/breaking/ct-transgender-rights-rally-chicago-photos-20170303-photogallery.html>

<sup>28</sup> Memo Outlines Education Dept. Plans to Scale Back Civil-Rights Efforts: <http://www.chronicle.com/blogs/ticker/memo-outlines-education-dept-plans-to-scale-back-civil-rights-efforts/118937>

<sup>29</sup> Education Dept. closes transgender student cases as it pushes to scale back civil rights investigations: [https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f\\_story.html](https://www.washingtonpost.com/local/education/education-dept-closes-transgender-student-cases-as-it-pushes-to-scale-back-civil-rights-investigations/2017/06/17/08e10de2-5367-11e7-91eb-9611861a988f_story.html)

<sup>30</sup> Why Palatine Became A Battleground Over Transgender Student Rights: <http://news.wjct.org/post/why-palatine-became-battleground-over-transgender-student-rights>

<sup>31</sup> Trump administration narrows civil rights investigations: <http://www.latimes.com/local/education/la-essential-education-updates-southern-trump-s-education-department-pulls-back-1497572246-htmlstory.html>



Jackson emphasized that in spite of the rescission of the May 2016 Dear Colleague Letter the rights of trans students would still be protected<sup>32</sup>. However, an internal memo in early June 2017 (parts I<sup>33</sup> & II<sup>34</sup>) to regional OCR directors and corresponding discrimination case closures were perceived by advocates as an indication that OCR intended to further limit its protective jurisdiction. While the memos outline certain prohibitive incidents of bullying and harassment such as pronoun misuse or sex stereotyping, they fail to mention cases dealing with facilities use. Further, the broadness of language involving gender discrimination, along with a push for a “case-by-case” approach, creates room for OCR to seemingly arbitrarily choose which cases fall under their jurisdiction.

There has also been some speculation about changes in guidance around data collection for investigations. The June internal memos indicated that in order to streamline the investigation process, OCR investigators will no longer be expected to obtain three years of past complaint data from an institution. ED Spokeswoman Elizabeth Hill told *The Chronicle of Higher Education*<sup>35</sup> that the new method eliminates “an artificial requirement to collect several years of data when many complaints can be adequately addressed much more efficiently and quickly.” While a case-by-case method may offer more discretion overall, certain cases of discrimination may not be the kind that require streamlining of efforts. The memo states that “OCR will only apply a ‘systemic’ or ‘class-action’ approach where the individual complaint allegations themselves raise systemic or class-wide issues.” This new guidance may indeed quicken the pace at which complaints are investigated, but some worry that it puts an unfair onus on the complainant to identify the pervasiveness of institutional oppression<sup>36</sup>.

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<sup>32</sup> Trump administration’s approach to handling transgender students’ civil rights complaints is described in memo: <https://www.washingtonpost.com/news/education/wp/2017/06/16/education-department-memo-lays-out-trump-administrations-approach-to-handling-transgender-students-civil-rights-complaints/>

<sup>33</sup> OCR Instructions to the Field re Complaints Involving Transgender Students: [https://www.scribd.com/document/351479120/Ocr-Instructions#from\\_embed](https://www.scribd.com/document/351479120/Ocr-Instructions#from_embed)

<sup>34</sup> OCR Instructions to the Field re Scope of Complaints: <https://www.propublica.org/documents/item/3863019-doc00742420170609111824.html>

<sup>35</sup> Memo Outlines Education Dept. Plans to Scale Back Civil-Rights Efforts: <http://www.chronicle.com/blogs/ticker/memo-outlines-education-dept-plans-to-scale-back-civil-rights-efforts/118937>

<sup>36</sup> Not Looking for Patterns: <https://www.insidehighered.com/news/2017/06/16/education-department-suggests-less-expansive-approach-ocr-investigations>



Further, while streamlining complaints makes sense to address the sizable backlog<sup>37</sup> in the department, cutting resources does not. *Diverse Issues in Higher Education* compiled data<sup>38</sup> to demonstrate that while the number of OCR complaints have risen by the thousands in the last few years, resulting in a large backlog of open cases, the ED 2018 Budget Request sought drastic cuts to OCR staff, maintaining that the remaining staff will be responsible for the investigation of complaints. If Ms. Jackson's goal was to address the backlog, then the department would require additional resources so it can continue to address complaints in a holistic way. The release of this ambiguous guidance in tandem with the possibility for caseload cherry-picking, suggested additional restrictions to trans protections within OCR.

In February 2018, several news outlets<sup>39</sup> reported that ED was officially taking a stance regarding bathroom access. These reports were confirmed by ED spokeswoman Liz Hill, who told NPR<sup>40</sup> that while harassment of transgender students would fall under Title IX, "In the case of bathrooms, however, long-standing regulations provide that separating facilities on the basis of sex is not a form of discrimination prohibited by Title IX."

## State Legislation Regarding Trans Rights & Protections

Rollbacks at the federal level appear to correlate with an onslaught of discriminatory "bathroom bills" which popped up at the state-level during the 2017 legislative cycle. Legislation followed the model of North Carolina's notorious HB 2<sup>41</sup>, later replaced with a slightly lighter, though still discriminatory policy<sup>42</sup>, limiting multi-occupancy bathroom access based on sex as assigned at birth. NASPA's Policy and Advocacy Team tracked various iterations of bathroom bills across 16

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<sup>37</sup> The Education Department Has A Huge Backlog Of Sexual Assault Investigations That's Still Growing: [http://www.huffingtonpost.com/2015/05/05/sexual-assault-backlog-education-department\\_n\\_7215748.html](http://www.huffingtonpost.com/2015/05/05/sexual-assault-backlog-education-department_n_7215748.html)

<sup>38</sup> Civil Rights Advocates: Scaling Back Higher Ed Investigations 'an Injustice': <http://diverseeducation.com/article/97961/>

<sup>39</sup> Department of Education will reject transgender bathroom complaints: <https://www.lgbtqnation.com/2018/02/department-education-will-reject-transgender-bathroom-complaints/>; and The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints: <https://www.buzzfeed.com/dominicholden/edu-dept-trans-student-bathrooms>

<sup>40</sup> The Education Department Says It Won't Act On Transgender Student Bathroom Access: <https://www.npr.org/sections/ed/2018/02/12/585181704/the-education-department-says-it-wont-act-on-transgender-student-bathroom-access>

<sup>41</sup> NC HB 2 (2016): <https://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v3.pdf>

<sup>42</sup> HB2 Repeal: North Carolina Overturns Controversial 'Bathroom Bill': <https://www.nbcnews.com/news/us-news/hb2-repeal-north-carolina-legislature-votes-overturn-controversial-bathroom-bill-n740546>



states in 2017, none of which moved forward to pass, despite Texas bringing two measures (TX HB 46<sup>43</sup> and TX HB 50<sup>44</sup>) into special session.

While the majority of the state bills acted on in 2018 aimed to limit the rights of trans individuals, seven had a gender inclusivity or anti-discrimination focus that extends to trans individuals. Examples of protective policies include New Jersey Assembly Bill 1727 (NJ A 1727<sup>45</sup>), which would create a Transgender Equality Taskforce, and Hawaii House Bill 2139 (HI HB 2139<sup>46</sup>), Hawaii Senate Bill 2353 (HI SB 2353<sup>47</sup>), and Idaho House Bill 408 (ID H 408<sup>48</sup>), all of which would prohibit discrimination on the basis of sex, including gender. Unfortunately, the bills in Hawaii and Idaho failed to progress before their state legislative session ended.

Several measures, such as Kentucky (KY HB 326<sup>49</sup>) and Tennessee (TN HB 888<sup>50</sup>), are traditional “bathroom bills” that limit bathroom and facility access based on either sex assigned at birth or listed on a birth certificate. As with most bathroom bills proposed in 2017, the bills this year in Kentucky and Tennessee similarly failed to pass. However, some of the discriminatory measures under consideration were unlike previous bills, and it was less certain how these measures would fare. Tennessee House Bill 2620 (TN HB 2620<sup>51</sup>) would have given power to the State Attorney General to represent local education authorities on cases pertaining to bathroom access for trans individuals, and essentially, give the state more power in determining the outcome of those rulings. Oklahoma Senate Bill 1250 (OK SB 1250<sup>52</sup>) would have connected the right to limit bathroom access with freedom of religion, relating to state-level trends in religious freedom restoration policies<sup>53</sup>. In keeping with the recent trends, however, both the Tennessee and Oklahoma bills did not progress before the sessions ended.

## Judicial Proceedings on Trans Student Rights & Protections

While federal agency action and state legislative action paints a dire picture for the future of trans rights, hope is not lost. Local and judicial proceedings continue to offer a pathway of inclusivity for trans individuals. In May 2017, the 7th Circuit Court interpreted Title IX sex

<sup>43</sup> TX HB 46 (2017): <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=851&Bill=HB46>

<sup>44</sup> TX HB 50 (2017): <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=851&Bill=HB50>

<sup>45</sup> NJ A 1727 (2018): [http://www.njleg.state.nj.us/2018/Bills/A2000/1727\\_11.HTM](http://www.njleg.state.nj.us/2018/Bills/A2000/1727_11.HTM)

<sup>46</sup> HI HB 2139 (2018): [https://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=HB&billnumber=2139](https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2139)

<sup>47</sup> HI SB 2353 (2018): [https://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=SB&billnumber=2353](https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2353)

<sup>48</sup> ID H 408 (2018): <https://legislature.idaho.gov/sessioninfo/2018/legislation/h0408/>

<sup>49</sup> KY HB 326 (2018): <http://www.lrc.ky.gov/record/18rs/HB326.htm>

<sup>50</sup> TN HB 888 (2018): <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB0888&ga=110>

<sup>51</sup> TN HB 2620 (2018): <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2620>

<sup>52</sup> OK SB 1250 (2018): <https://legiscan.com/OK/bill/SB1250/2018>

<sup>53</sup> National Conference of State Legislatures State Religious Freedom Restoration Acts: <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>



discrimination and the 14th Amendment to extend to trans individuals in *Whitaker vs. Kenosha Unified School District*<sup>54</sup>, citing that Wisconsin was in violation of Title IX sex discrimination prohibitions by denying Ashton Whitaker<sup>55</sup>, a senior high school student in the case, from using the restroom corresponding with his gender identity. If the case receives a similarly favorable decision from the Supreme Court, trans protections under Title IX will be enforced as existing law. In November 2017, Rachel Tudor<sup>56</sup> was awarded \$1.1 million after having been found to have been discriminated against her place of work, Southeastern Oklahoma State University. A number of court rulings in the Tudor case found that Title VII anti-discrimination laws in employment extend to sexual orientation and gender identity.

As some potentially landmark cases were making their way through the court system, President Trump was elected and took office. As noted previously, the Trump Administration quickly began to roll-back the federal guidance and protection for trans individuals. In March 2017, SCOTUS reversed their decision to hear *GG v. Gloucester County School Board* and remanded<sup>57</sup> the case back to the 4th Circuit Court of Appeals due to the change in OCR guidance, which the 4th Circuit Court relied on, in part, to reach their ruling in the case.

### The Value of Federal-Level Precedent

Secretary of Education Betsy DeVos testified before the House Education and Workforce Committee in May 2018 providing comments on “Examining the Policies and Priorities of the U.S. Department of Education”<sup>58</sup>. During the hearing, Representative Jared Polis (D-CO) cited federal Appeals Court decisions, *Kenosha v. Whitaker* and *Glenn v. Brumby*<sup>59</sup>, to point to standing legal precedent regarding trans protections. Secretary DeVos pointed out that these cases had not yet reached SCOTUS, and that the Department of Education would not recognize these cases as precedent until they had undergone the decision-making process through the

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<sup>54</sup> Appeals court sides with transgender student in Wis. school bathroom case:

[https://www.washingtonpost.com/local/education/appeals-court-sides-with-transgender-student-in-wis-school-bathroom-case/2017/05/30/3f5f6e98-4572-11e7-bcde-624ad94170ab\\_story.html](https://www.washingtonpost.com/local/education/appeals-court-sides-with-transgender-student-in-wis-school-bathroom-case/2017/05/30/3f5f6e98-4572-11e7-bcde-624ad94170ab_story.html)

<sup>55</sup> Transgender Student Wins Appeal in Final Week of School: <https://www.usnews.com/news/best-states/wisconsin/articles/2017-05-30/transgender-student-at-wisconsin-high-school-wins-appeal>

<sup>56</sup> Jury awards transgender professor \$1.1 million in discrimination case:

<https://www.nbcnews.com/feature/nbc-out/jury-awards-transgender-professor-1-1-million-discrimination-case-n822646>

<sup>57</sup> Supreme Court Rejects Gavin Grimm's Transgender Bathroom Rights Case:

<https://www.nbcnews.com/news/us-news/u-s-supreme-court-rejects-transgender-rights-case-n729556>

<sup>58</sup> House Education and Workforce Committee May 2018 hearing “Examining the Policies and Priorities of the U.S. Department of Education”:

<https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=402726>

<sup>59</sup> *Glenn v. Brumby* (2011): <https://cases.justia.com/federal/appellate-courts/ca11/10-14833/201014833-2011-12-06.pdf?ts=1411120294>



nation's highest court and thus, in her interpretation, became binding. While the Supreme Court of the United States (SCOTUS), the highest court with the final say on matters of federal jurisdiction, the role of lower courts and state rulings are legally binding in their jurisdictions and should not be overlooked.

The two cases cited by Representative Polis, therefore, deserve a closer look. The case of *Whitaker vs. Kenosha United School District* has been described in detail above. In the 2011 case *Glenn v. Brumby*<sup>60</sup>, a trans woman won her workplace discrimination claim under the 11th Circuit Court of Appeals, determining that discrimination against someone on the basis of gender non-conformity extends to sex-based discrimination under the Equal Protection Clause. As both cases were made by Courts of Appeals, these cases establish legally binding precedent to all the trial courts below them.

Despite Secretary DeVos's opinion, the precedent established by these rulings does matter and is considered binding<sup>61</sup> for all lower courts covered by the higher court's jurisdiction until and unless a higher court rules differently. If a case is not appealed to a higher court, or if a higher court declines to review and issue a decision on a lower court case, the ruling of the lower court stands as case law and may be used as evidence of legality in other cases. For the cases cited by Representative Polis, until and unless SCOTUS takes up either case, the rulings reached by the Appeals Courts are legally binding on all lower courts in the 7th and 11th Circuits. Even in the case of Gavin Grimm, a federal judge ruled in favor of the student<sup>62</sup> in late May 2018, finding that Gloucester High School had violated Title IX by denying him bathroom access matching his gender identity. This case is important in continuing to establish a trend toward trans inclusiveness in lower court rulings.

## **Courts Continue to Challenge Protection of Gender Identity and Bathroom Access**

State and federal-level courts continue to consider trans rights within public K-12 school districts. The outcome of these rulings may impact public postsecondary institutions as well. Courts have been asked to rule on the legality of trans inclusive policies in recent cases in

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<sup>60</sup> Woman who underwent sex change wins workplace discrimination claim:

<https://www.cnn.com/2011/12/12/us/sex-change-case/index.html>

<sup>61</sup> <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/Which-Court-is-Binding-HandoutFinal.pdf>

<sup>62</sup> Court sides with transgender student in his fight to use the boys' bathroom:

[https://www.washingtonpost.com/local/education/court-sides-with-transgender-student-in-his-fight-to-use-the-boys-bathroom/2018/05/22/96417800-5e03-11e8-9ee3-49d6d4814c4c\\_story.html](https://www.washingtonpost.com/local/education/court-sides-with-transgender-student-in-his-fight-to-use-the-boys-bathroom/2018/05/22/96417800-5e03-11e8-9ee3-49d6d4814c4c_story.html)



Maryland, Missouri, Montana, Oregon, and Pennsylvania regarding bathroom and facility use access.

This past spring, student Max Alexander Brennan continued to push the Maryland courts<sup>63</sup> to allow for his use of the boys' locker room at his local high school in *M.A.B. v. Board of Education of Talbot County*<sup>64</sup>. While former precedent established from *GG v. Gloucester County School Board's* original case<sup>65</sup> before the 4th Circuit Court of Appeals incentivized his school to allow him use of the boys' restroom, Max was still denied locker room access. Max won his case in March after a federal judge ruled that Maryland's constitution extends protections to trans individuals. The outcome of *M.A.B. v. Board of Education of Talbot County*, while in favor of the trans student, only provided access for Max and did not provide a guarantee that locker room access would be made available according to the gender identity of all students in his school district moving forward.

Missouri's Human Rights Act<sup>66</sup> came under question this past April when the Missouri Supreme Court heard arguments for *Rachelle Appleberry v. Blue Springs R IV School District*<sup>67</sup>. The case involved a trans student in Blue Springs R-IV School District being denied access to the male restroom and locker rooms. The student was denied access even after the school district changed the student's name in their records and allowed him to participate in sports with other male students. The Missouri Human Rights Act states that "all persons within the jurisdiction of the state of Missouri are free and equal" and entitled to public facility use access such as restrooms "without discrimination or segregation because of race, color, religion, national origin, sex, ancestry, or disability." The attorney representing the student argued that should the courts decide that the law does not extend to gender identity, it could greatly affect the rights of trans individuals in public institutions across the state. A ruling is expected in the coming months.

In late spring 2018 a Montana district court judge heard testimony in the case of *Hobaugh v. Montana*<sup>68</sup>, a case brought on by the Montana Room Privacy Act, which is a ballot measure

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<sup>63</sup> Battle over transgender student rights moves to high school locker rooms:

[https://www.washingtonpost.com/local/public-safety/battle-over-transgender-student-rights-moves-to-high-school-locker-rooms/2018/04/25/b319365a-3f29-11e8-974f-aacd97698cef\\_story.html](https://www.washingtonpost.com/local/public-safety/battle-over-transgender-student-rights-moves-to-high-school-locker-rooms/2018/04/25/b319365a-3f29-11e8-974f-aacd97698cef_story.html)

<sup>64</sup> *M.A.B. v. Board of Education of Talbot County*: <https://freestate-justice.org/wp-content/uploads/2018/03/MAB-2018.03.12-Memorandum-Opinion-Denying-Motion-to-Dismiss-and-Pl.pdf>

<sup>65</sup> Federal appeals court sides with transgender teen, says bathroom case can go forward:

[https://www.washingtonpost.com/local/education/federal-appeals-court-sides-with-transgender-teen-says-bathroom-case-can-go-forward/2016/04/19/6a873b88-f76b-11e5-9804-537defcc3cf6\\_story.html](https://www.washingtonpost.com/local/education/federal-appeals-court-sides-with-transgender-teen-says-bathroom-case-can-go-forward/2016/04/19/6a873b88-f76b-11e5-9804-537defcc3cf6_story.html)

<sup>66</sup> Missouri's Human Rights Act:

<http://revisor.mo.gov/main/OneSection.aspx?section=213.065&bid=34595&hl=>

<sup>67</sup> *Rachelle Appleberry v. Blue Springs R IV School District*: <https://caselaw.findlaw.com/mo-court-of-appeals/1868161.html>

<sup>68</sup> *Hobaugh v. Montana*: <https://www.aclu.org/cases/hobaugh-v-montana>



restricting public bathroom and facility use access to one's corresponding "biological sex." The complainant in *Hobaugh v. Montana*, the American Civil Liberties Union, is challenging the measure before it appears on the ballot, which is slated for the November election.

The two other cases, heard in court in late spring 2018, also deal with bathroom use access, but with the school's trans inclusive policies being brought into question. An Oregon case, *Parents Privacy v. Dallas School District*<sup>69</sup>, pursued by Parents for Privacy and Parents' Rights in Education, is aimed against inclusive bathroom policies instituted in a local school district. The complainant in *Parents Privacy v. Dallas School District* argues that the new policies work against Title IX, in that the policies "radically changed the meaning of 'sex'" in expanding these protections to be inclusive of gender identity. In addition, the complainant finds the inclusive policies problematic because they believe it means that young students will inevitably encounter a student of the opposite sex in "private intimate spaces."

The final case considered in late spring 2018 is that of *Doe v. Boyertown*<sup>70</sup>, which will appear before the 3rd Circuit Court of Appeals in Philadelphia. Similar to the Oregon case, the parents in this case claim the school district's gender inclusive bathroom policy violates student privacy. *Doe v. Boyertown* argues that the district's "accommodation crosses a statutory and constitutional line when the District authorizes entry of one sex into the other sex's privacy facilities."

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<sup>69</sup> *Parents Privacy v. Dallas School District*: <https://www.aclu.org/legal-document/parents-privacy-v-dallas-school-district-no-2-complaint>

<sup>70</sup> *Doe v. Boyertown*: [https://www.aclu.org/sites/default/files/field\\_document/reply\\_brief\\_of\\_appellants.pdf](https://www.aclu.org/sites/default/files/field_document/reply_brief_of_appellants.pdf)



## Higher Education and Student Affairs Professionals Role

Without litigation from SCOTUS, a permanent legislative solution from Congress, or guidance from the Department of Education, states continue to grapple with interpreting sex discrimination protections under Title IX. However, current judicial outcomes show a persuasive trend in decisions that favor trans rights, and as court cases continue to move through the judiciary system. The refusal of the federal government to recognize and protect the rights of trans individuals does not mean our institutions and states cannot step up to the task. Indeed, it is our responsibility as higher education professionals and constituents to urge our institutions and states to do so during times like these. NASPA continues to stand by our trans colleagues and students.

### Institutional advocacy

The breadth of attacks, spanning all three branches of the federal government as well as state and local policies and laws, leave numerous ways<sup>71</sup> in which institutions and individuals might effectively advocate for trans individuals' rights. Institutions can be powerful voices in local government as well as in statehouses representing not only their students, faculty, and staff, but also through their presence and influence in communities. Letting state legislators know of institutional support for legislation, such as that which has been passed or recently introduced in many states<sup>72</sup>, that adds sexual orientation and gender identity to anti-discrimination laws or opposition to "bathroom bills" is one possibility. Institutions may also request meetings with staff in state agencies responsible for ensuring anti-discrimination laws are implemented, or federal agencies such as ED, or DOJ to share stories of trans individuals on their campuses and how they benefit from regulations and policies that protect their rights. Higher education professionals and institutions that engage in advocacy to protect trans rights help lessen the burden on trans individuals themselves to do this advocacy through lawsuits and other activism, sometimes at great personal expense.

Institutions often have autonomy over their own policies<sup>73</sup> and can make public statements addressing non-discrimination in their own admissions, housing, and hiring practices. Campuses can work to ensure the availability of gender-neutral housing options, bathrooms, and locker rooms and maintain and enforce clear policies around the use of chosen names and pronouns. In 2014, the Consortium of Higher Education LGBT Resource Professionals Trans\* Policy Working

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<sup>71</sup> NASPA Statement on Trump Administration's Reversal of Transgender Student Protections and Higher Education's Response: <https://www.naspa.org/constituent-groups/posts/trump-administrations-reversal-of-trans-student-protections-and-response>

<sup>72</sup> Transgender Law Center Equality Maps: <https://transgenderlawcenter.org/equalitymap>

<sup>73</sup> Beemyn, G. (2017). Necessary Practices for Supporting Trans Students: [https://www.umass.edu/stonewall/sites/default/files/faculty\\_spring\\_17.pdf](https://www.umass.edu/stonewall/sites/default/files/faculty_spring_17.pdf)



Group developed a set of best practice recommendations<sup>74</sup> to assist colleges and universities in developing trans-inclusive policies and programming. The nonprofit organization Campus Pride maintains a clearinghouse of sample institutional policies<sup>75</sup> that are trans-inclusive, including policies that cover transition-related medical expenses for students and employees, changes to official campus records for name and gender, and intramural athletics policies.

### Faculty and staff advocacy on campus

Individual faculty and staff on campus can be influential both as direct advocates for the rights of trans individuals on campus and as educators, raising the visibility of trans individuals and fostering learning to reduce the burden<sup>76</sup> on trans individuals of educating their peers. Faculty and staff can serve on campus governance bodies responsible for crafting institutional policies to be sure that trans-inclusive language and policies are intentionally developed. Sharing stories of trans individuals with campus leadership or external stakeholders to demonstrate the importance of trans inclusive policies and practices can help to humanize issues for policymakers. Partnerships with local and national community and advocacy organizations, such as Campus Pride<sup>77</sup>, the Transgender Law Center<sup>78</sup>, or the National Center for Transgender Equality<sup>79</sup>, to provide both awareness raising and services to trans individuals can be a simple but effective means of advocating for trans individuals. Faculty and staff may also consider hosting a study group for colleagues or students using Dr. Z Nicolazzo's Trans\* Studies in Higher Education syllabus<sup>80</sup> as a guide for participants.

### Faculty and staff personal advocacy

Engaging in personal advocacy can take the form of contacting elected officials about specific legislation, engaging with state or federal agency staff, participating in community-based educational or advocacy organizations, or even working through your own social networks to educate and raise awareness of the barriers trans individuals face. Student affairs professionals can use their professional expertise working with trans individuals and use institutionally based examples to add credibility to their personal advocacy with elected officials, but should take care

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<sup>74</sup> Suggested Best Practices for Supporting Trans\* Students:

[https://lgbtcampus.memberclicks.net/assets/consortium\\_suggested\\_trans\\_policy\\_recommendations-compressed.pdf](https://lgbtcampus.memberclicks.net/assets/consortium_suggested_trans_policy_recommendations-compressed.pdf)

<sup>75</sup> Campus Pride Trans Policy Clearinghouse: <https://www.campuspride.org/tpc/>

<sup>76</sup> How to talk (and listen) to transgender people:

[https://www.ted.com/talks/jackson\\_bird\\_how\\_to\\_talk\\_and\\_listen\\_to\\_transgender\\_people](https://www.ted.com/talks/jackson_bird_how_to_talk_and_listen_to_transgender_people)

<sup>77</sup> Campus Pride: <https://www.campuspride.org/>

<sup>78</sup> Transgender Law Center: <https://transgenderlawcenter.org/>

<sup>79</sup> National Center for Transgender Equality: <http://www.transequality.org/issues/youth-students>

<sup>80</sup> Dr. Z Nicolazzo's Trans\* Studies in Higher Education syllabus:

<https://docs.google.com/document/d/1uUFd5pMLTOigvVtt9uJYmimhH2w4rZL9azrrUiqZJc/edit>



not to identify individuals without their permission. When engaging in personal advocacy, you should be clear that you are not speaking as a representative of your employer or institution, either by including a statement if you are speaking or writing or adding a disclaimer in social media profiles. We cover a few other cautions about engaging in personal advocacy as a campus employee in our NASPAacts Policy Basics: Your Role in Our Representative Democracy<sup>81</sup> post from last spring.

## Supporting student advocacy and civic engagement

Just as student affairs professionals can establish connections with community organizations to provide services and resources, they can also reach out to organizations with campus-based programs to support student advocacy and civic engagement. For example, the Southern Poverty Law Center<sup>82</sup> offers options for on-campus programs to help students engage in advocacy around trans issues and the Transgender Law Center<sup>76</sup>, and the National Center for Transgender Equality<sup>77</sup> offer a variety of options for students and youth to become involved. Providing assistance<sup>83</sup> for students who may want to organize letter-writing campaigns or legislative action days in states where bathroom bills are introduced may also be an option, though you should speak with your campus government affairs and leadership team to be sure there are not additional laws or restrictions on your involvement as an employee. NASPA members who are interested in more resources for promoting civic learning and democratic engagement should follow the Civic Learning and Democratic Engagement (CLDE) Knowledge Community<sup>84</sup> and the NASPA Lead Initiative on CLDE<sup>85</sup>.

## About NASPA

NASPA – Student Affairs Administrators in Higher Education is the leading association for the advancement, health, and sustainability of the student affairs profession. Student affairs is a critical component of the higher education experience, collaborating with colleagues across institutions of higher education to offer students valuable learning opportunities, meaningful social engagements, and safe and inclusive environments. NASPA’s Public Policy Agenda is

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<sup>81</sup> NASPAacts Policy Basics: Your Role in Our Representative Democracy:

<https://www.naspa.org/rpi/posts/naspacts-policy-basics-your-role-in-our-representative-democracy>

<sup>82</sup> Southern Poverty Law Center On Campus: <http://www.splconcampus.org/>

<sup>83</sup> The Campaign Workshop Blog Legislative Advocacy 101:

<https://www.thecampaignworkshop.com/legislative-advocacy-101>

<sup>84</sup> NASPA Civic Learning and Democratic Engagement (CLDE) Knowledge Community:

<https://www.naspa.org/constituent-groups/kcs/civic-learning-and-democratic-engagement>

<sup>85</sup> NASPA Lead Initiative on CLDE: <https://www.naspa.org/constituent-groups/groups/lead-initiative>



grounded in a commitment to ensuring opportunity for all institutional members' students and a belief that higher education is a great benefit to both individuals and society.<sup>86</sup>

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<sup>86</sup> For more information on the National Student Affairs Day of Action, please visit:

<https://www.naspa.org/focus-areas/civic-learning-and-democratic-engagement/national-student-affairs-day-of-action>

